IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 498 of 2002

For Approval and Signature:

HONOURABLE MR.JUSTICE J.M.PANCHAL
AND
HONOURABLE MR.JUSTICE H.B.ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether Their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5 Whether it is to be circulated to the Civil Judge?

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MANGALIMGAM ALIAS SHIVO MURUGAIYAN PILLAI - Appellant

Versus

STATE OF GUJARAT - Opponent

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Appearance :
THROUGH JAIL for the Appellant.
MR RS PANJWANI for the Appellant.
MR SR DIVETIA for the Appellant.
MR ND GOHIL, ADDITIONAL PUBLIC PROSECUTOR for the Opponent.
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CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL
and
HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 20/10/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE J.M.PANCHAL)

1. Instant appeal, filed under Section 374 (2) of the

Code of Criminal Procedure, 1973, is directed against judgment dated April 22, 2002 rendered by learned Additional Sessions Judge, Court No. 16, Ahmedabad City in Sessions Case No. 33 of 2001, by which the appellant is convicted under Sections 20 and 21 (b) of the Narcotic and Psychotropic Substances Act, 1985 (*"the Act"*, for short) and sentenced to suffer RI for 6 months and fine of Rs. 10,000/- (Rupees Ten Thousand), in default SI for 15 days, for commission of offence punishable under Section 20 of the Act as well as RI for 10 years and fine of Rs. 1,00,000/- (Rupees One Lakh Only), in default SI for 30 days, for commission of offence punishable under Section 21 (b) of the Act.

2. The facts emerging from the record of the case are as under:

On or about February 12, 2001, Mr. B. R. Patel was discharging duties as Police Inspector of Amraiwadi Police Station, Ahmedabad City. On that day, he received an information from his informant that one person, wearing military coloured jacket and brown coloured jeans, was selling *charas* and brown sugar at Bhundvada, near Talawali Chawl, Baipura, Amraiwadi, Ahmedabad. The

information received was reduced into writing by him. He also forwarded report, as contemplated by Section 42 (2) of the Act to his immediate official superior i.e. Assistant Commissioner of Police (I Division), City Ahmedabad. He asked Head Constable Mahendrasinh to requisition services of two *panch-witnesses*. Accordingly, Head Constable Mahendrasinh summoned two witnesses, namely, (1) Dinesh Mafabhai Desai and (2) Balwantbhai Maganbhai Thakore. On their arrival, PI Mr. Patel ascertained from them whether they were willing to act as *panch-witnesses*. As those two persons expressed their willingness to act as *panch-witnesses*, they were made known about the information received by him. Necessary articles needed in a raid were collected and primary part of *panchnama* was drawn in the Police Station itself. Thereafter, the members of the raiding party together with *panch-witnesses* proceeded to the place indicated in the information in Government vehicle as well as private vehicle. The vehicles were halted near Happy Home Society and, thereafter, the members of the raiding party proceeded to the place indicated in the information on foot. A watch was maintained by the members of the raiding party. The person, who was answering description given in the information, was found

standing near Bhundvada. However, on seeing the police personnel and others approaching him, he made an attempt to abscond, which was foiled by PI Mr. Patel by hitting him with a stick. On receipt of blow of stick, the person, who was making attempt to abscond, fell down and was caught. On interrogation, he disclosed his name to be Mangalimgam *alias* Shivo Murugaiyan Pillai (the appellant).PI Mr. Patel informed him that an information was received that he was dealing in *charas* and brown sugar and, therefore, it was necessary to search his person. Before effecting search of person of the appellant, PI Mr. Patel offered to search the appellant in presence of a Magistrate or a Gazetted Officer, but the said offer was declined by the appellant. Thereupon, the person of the appellant was searched. During the course of search, a transparent plastic-bag, containing blue coloured powder and 9 small packets, were found from the pocket of his jacket. On opening those 9 packets, each of them was found to be containing blue coloured powder. Further search of the person of the appellant resulted into find of a transparent plastic bag containing black coloured powder, which was kept in right side pocket of his pant. It was necessary to weigh the substances found from possession of the appellant.

Therefore, Police Head Constable Mafatlal was directed to summon a person to weigh the substances found from possession of the appellant. Accordingly, one Mr. Chetan Barot was summoned by Police Head Constable Mafatlal to weigh the subtances. Mr. Barot weighed the two substances and it was found that *charas* was weighing 44 Grams and 650 Miligrams whereas brown sugar was weighing 13 Grams and 170 Miligrams. Out of the substances found, *muddamal* samples were collected in two separate polythene bags and each bag was sealed, as required by law. PI Mr. Patel demanded from the appellant pass or permit authorising him to possess *charas* and brown sugar, but no such pass or permit could be produced by the appellant. The appellant was, therefore, arrested. Second part of the panchnama was completed at the place itself. Thereafter, PI Mr. Patel lodged his complaint against the appellant. He handed-over his complaint, *panchnama*, *muddamal*, appellant, etc. to Police Officer In-charge of Police Station. After registration of the offences against the appellant, complaint lodged by PI Mr. Patel was handed over to PI Mr. Waghela for investigation. Handed-over *muddamal* was kept in safe custody and forwarded to the Forensic Science Laboratory (FSL) intact. Investigating Officer Mr. Waghela recorded

statements of those persons who were found to be conversant with the facts of the case. Report of the analysis indicated that the substances, which were found from the possession of the appellant and analysed, were respectively *charas* and brown sugar within the meaning of the Act. On completion of investigation, the appellant was chargesheeted in the Sessions Court, Ahmedabad City, on the basis of which, Sessions Case No. 33 of 2001 was registered.

3. The learned Additional Sessions Judge, Sessions Court, Ahmedabad City, to whom the case was made over for trial, framed necessary charge against the appellant at Exh. 1. It was read over and explained to him. He pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined: (i) *panch-witness* Balwantbhai Maganbhai Thakore as PW 1, at Exh. 7; (ii) Police Station Officer Mr. Chimanlal Ramabhai Parmar as PW 2, at Exh. 12; (iii) Assistant Sub-Inspector Hamjibhai Jyotibhai Pargi as PW 3, at Exh. 15; (iv) Head Constable Mahendrasinh Prithvisinh as PW 4, at Exh. 18; (v) PI Mr. Bhupendrabhai Ratilal Patel as PW 5, at Exh. 21; and, (vi) Investigation Officer Mr. Talaji Pratapji Waghela as PW 6, at Exh. 30, to prove its case against the

appellant.

The prosecution also produced documentary evidence, such as: (i) *panchanama* of search of person of the appellant and find of *charas* as well as brown sugar from him, at Exh. 8; (ii) entry indicating that *muddamal*, etc. was handed-over to Mahendrasinh after analysis, at Exh. 17; (iii) entry from Station Diary indicating that information received by PI Mr. Patel was reduced into writing, as required by Section 41 (2) of the Act, at Exh. 24; (iv) complaint lodged by PI Mr. Patel, at Exh. 25; (v) forwarding letter with which *muddamal, panchnama*, etc. were handed-over to PSO of the Police Station, at Exh. 26; (vi) seizure memo served on the appellant, at Exh. 27; (vii) arrest memo of the appellant, at Exh. 28; (viii) report of the analysis, at Exh. 35, etc. in support of its case against the appellant.

5. After recording of evidence of *panch-witnesses* was over, the learned Judge of the Trial Court explained to the appellant the circumstances appearing against him in the evidence of prosecution witnesses and recorded his further statement, as required by Section 313 of the Code of Criminal Procedure, 1973. In his further statement,

the appellant claimed that he was arrested from Juhapura at 10.30 AM along with 5 others by police officials from where he was taken to Amraiwadi and a false case was foisted upon him. In order to substantiate his defence, the appellant examined Kherunnisa Anvarali Saiyed as DW 1 at Exh. 33.

6. On appreciation of evidence adduced by the parties, the learned Judge held that it was proved by the prosecution beyond reasonable doubt that the appellant was found in conscious possession of *charas* and brown sugar at about 3.00 PM on February 12, 2001 without pass or permit and was, therefore, liable to be convicted under Sections 20 and 21 (b) of the Act. The learned Judge noticed that mandatory provisions of Sections 42 and 50 of the Act were fully complied with by PI Mr. Patel. After noticing evidence tendered by defence witness, the learned Judge held that the defence pleaded by the appellant that he was falsely implicated in the case was not probabilised. In view of abovereferredto conclusions, the learned Judge has convicted the appellant under Sections 20 and 21 (b) of the Act and imposed sentences referred to earlier by judgment dated April 22, 2002, giving rise to instant appeal.

7. This Court has heard Mr. S. R. Divetia, learned Counsel of the appellant and Mr. N.D. Gohil, learned Additional Public Prosecutor for the State, at length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case as well as the entire evidence on record with reference to broad and reasonable probabilities of the case.

8. The plea, that provisions of Section 42 were not complied with and, therefore, the appellant is entitled to acquittal, is merely stated to be rejected. Admittedly, neither a building nor a conveyance nor an enclosed place was searched, but search was carried out in a public place and, therefore, provisions of Section 42 of the Act would not be applicable. This is so in view of the decisions of the Supreme Court in: (1) **Rajendra And Another Vs. State of M. P., (2004) 1 SCC 432**; (2) **Krishna Kanwar (Smt.) alias Thakuraeen Vs. State of Rajasthan**, **(2004) 2 SCC 608**; and, (3) **State of Haryana Vs. Jarnail Singh and Others, (2004) 5 SCC 188.** Even otherwise, the record indicates that on receipt of information, the same was reduced into writing. This is assertively stated by PI Mr. Patel, whose testimony is

recorded at Exh. 21. This assertion could not be shown to be false. The assertion made by PI Mr. Patel stands corroborated by entry from Station Diary, which is produced at Exh. 23. Therefore, there is no manner of doubt that on receipt of information, the same was reduced into writing. The testimony of PI Mr. Patel further shows that after reducing the information into writing, he had submitted his report to his immediate official superior i.e. Assistant Commissioner of Police, as required by Section 42 (2) of the Act. The report forwarded by him under Section 42 (2) of the Act is produced by the prosecution at Exh. 24. The fact, that report, as contemplated by Section 42 (2) of the Act, was forwarded by PI Mr. Patel to his immediate official, is mentioned in his complaint, which was lodged by him promptly. As the record satisfactorily establishes that provisions of Section 42 were complied with, no benefit can be given to the appellant on the ground that mandatory provisions contained therein were committed breach of by PI Mr. Patel.

9. The contention, that provisions of Section 50 of the Act were not complied with and, therefore, the appeal should be allowed, is also stated to be rejected. The

record and more particularly, reliable, categorical and cogent evidence adduced by PI Mr. Patel in no uncertain terms establishes that before effecting search of person of the appellant, he had offered the appellant to be searched in presence of a Magistrate or a Gazetted Officer. This fact is mentioned by *panch-witness* and other police officials examined in the case. This fact is also mentioned in the complaint lodged by PI Mr. Patel. Therefore, the learned Judge of the Trial Court was justified in coming to the conclusion that provisions of Section 50 were fully complied with by PI Mr. Patel.

10. The evidence on record further shows that *muddamal* was kept in safe custody at the Police Station and the samples had reached FSL intact. The record does not show that there was any possibility of tampering with the same. The report of the analysis shows that the substances which were found from the appellant were respectively *charas* and brown sugar within the meaning of the Act. However, this Court finds that the appellant should have been convicted under Section 20 (b) (ii) (A)of the Act, as he was found in possession of *charas*, quantity of which was less than small quantity prescribed under the Act. Therefore, it is held that for possession

of *charas,* the appellant is liable to be convicted under Section 20 (b) (ii) (A) of the Act. As far as possession of brown sugar is concerned, this Court finds that the appellant could not have been convicted under Section 21 (b) of the Act because it is not the case of the prosecution that the appellant was found in possession of manufactured drug within the meaning of the Act. Therefore, for possession of brown sugar, the appellant is liable to be convicted under Section 22 (b) of the Act as contravention involves quantity less than commercial quantity but greater than small quantity. Accordingly, the appellant is convicted under Section 20 (b) (ii) (A) and Section 22 (b) of the Act. Further, the record shows that the appellant has bad antecedents and he is convicted under Sections 143, 147, 148, 302 read with Section 149 IPC as well as Section 135 (1) of the Bombay Police Act, 1951 and is visited with punishment of RI for life and other sentences are also imposed on him. Therefore, discretion exercised by the learned Judge of the Trial Court in imposing sentence cannot be said to be arbitrary or capricious so as to warrant interference of this Court in instant appeal. The learned Counsel of the appellant has failed to make out good grounds for setting aside the judgment impugned in the appeal. The appeal,

therefore, which lacks merits, deserves to be dismissed.

11. For the foregoing reasons, the appeal fails and is dismissed. *Muddamal* be disposed of in terms of directions given by the learned Judge of the Trial Court in the impugned judgment.

[J. M. PANCHAL, J.]

[H. B. ANTANI, J.]

/shamnath